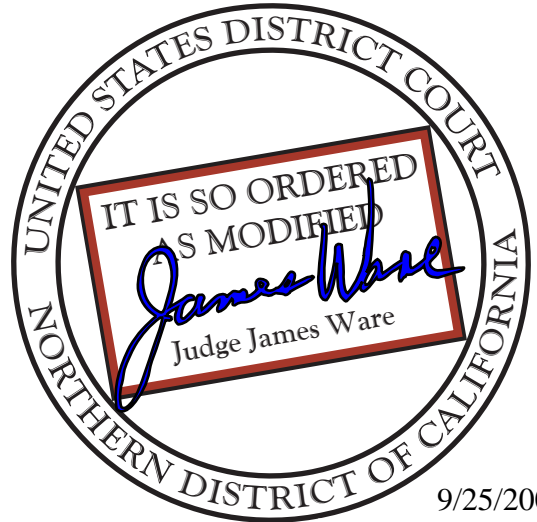


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16 FOR THE NORTHERN DISTRICT OF CALIFORNIA
17 SAN JOSE DIVISION
18

19 **CHARLES VANEY QUEEN,**

C 99-21067 JW

20 Petitioner,

21 v.

22 **ANTHONY C. NEWLAND, Warden,**

23 Respondent.
24

25 ***AMENDED*** **JOINT STATUS REPORT AND STIPULATION**
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27
28

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**JOINT STATUS REPORT
AND STIPULATION**

25 By order filed August 10, 2007, this Court set a pretrial conference for September 26,
26 2007, and an evidentiary hearing for October 10 and 11, 2007. As this Court is aware, this case is
27 on remand from the Ninth Circuit, Case No. 03-16187, for this Court to “develop the record” and
28 make a determination on whether petitioner is entitled to equitable tolling based on his mental health

and his allegation regarding the lack of AEDPA materials prior to 1998 at CSP-Solano in light of *Laws v. Lamarque*, 351 F.3d 919, 923-24 (9th Cir. 2003) and *Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir. 2000)(en banc). Petitioner's conviction became final on direct appeal in 1991. The AEDPA year for all inmates whose appeals were final before the statute became effective runs from April 24, 1996, to April 24, 1997. Petitioner was at Calipatria State Prison until October 2, 1996. Petitioner was at Salinas Valley State Prison from October 2, 1996 to April 25, 1997. On April 25, 1997, he transferred to CSP-Solano. In addition to asserting a lack of AEDPA library materials, petitioner provided medical records through November 13, 1997. Exh. A to Objection to Respondent's Motion to Dismiss, filed January 23, 2001.

A. An Evidentiary Hearing Is Not Required On The Libraries Question Or On The Question Of Whether Petitioner Is Entitled To Equitable Tolling For Any Period Up To November 14, 1997

Following remand, this Court initially asked counsel to address whether an evidentiary hearing will be necessary, or whether the case may be resolved by expansion of the record. Respondent proposes that the parties and the Court dispense with the evidentiary hearing on the libraries question in light of the order in *Hardison v. Newland*, No. C 98-4517 CRB, in which Judge Breyer, after conducting a three-day evidentiary hearing, determined that CSP-Solano received a new and complete copy of 28 U.S.C., including the text of the AEDPA, on November 14, 1997. Resp. Exh. A. That is, respondent is offering to deem November 14, 1997, the first day of petitioner's AEDPA year. Petitioner accepts this suggestion.

While respondent does not concede that any particular institution was deficient during any particular period, respondent here recognizes that petitioner was at three different institutions during the presumptive AEDPA year and immediately afterwards. In light of the *Hardison* result and the passage of time, it simply does not seem like a worthwhile use of judicial, attorney or witness resources to reconduct the CSP-Solano hearing, or to broaden the inquiry to two additional far-flung institutions, to determine at this late date what books were on the prison library shelves for particular months in 1996 and early 1997. The parties' stipulation that the *Hardison* result may be deemed determinative on the question of library tolling as to petitioner renders it unnecessary to determine if petitioner was mentally challenged so as to give rise to equitable tolling on any of the days when

1 the AEDPA text might have been available to him prior to November 14, 1997.

2 For this reason the parties stipulate that the evidentiary hearing presently scheduled for
3 October 10 and 11, 2007, may be vacated.

4
5 B. The Remaining Question, Whether There Was Statutory Or Equitable Tolling Rendering
6 The October 26, 1999, Filing Timely, Is Not Ripe For An Evidentiary Hearing, But May
7 Become So

8 Even if the parties and the Court adopt the *Hardison* date of November 14, 1997, as the
9 first date of petitioner's effective AEDPA year, however, the period from November 14, 1997, to
10 the filing of the federal petition on October 26, 1999, must be analyzed. The parties may not entirely
11 agree on the details of this analysis, but do agree that an appropriate method of getting the ball
12 rolling on this next phase of the case is for respondent to file a renewed motion to dismiss.
13 Respondent does so concurrently.

14 C. Petitioner Requests 60 Days To Address The Issues Of Statutory And Equitable Tolling

15 To move things along, respondent is filing a renewed motion to dismiss the petition as
16 untimely. Petitioner requests 60 days to respond to this argument and present any additional
17 exhibits relevant to statutory or equitable tolling during the period November 14, 1997, to October
18 26, 1999. Respondent agrees this is a reasonable time frame and a reasonable next step. All
19 previous argument and evidence in this case has been directed to refuting respondent's original
20 position that the 1988 and 1989 state petitions were irrelevant because they could not resuscitate a
21 statutory limitations period that had already expired. There were three petitions filed in state court
22 during this period.^{1/} In light of the *Hardison* stipulation and the recent United States Supreme Court
23 opinion in *Evans v. Chavis*, 546 U.S. 189, 126 S.Ct. 846, 163 L.Ed.2d 684 (2006), the timeliness of
24 the state collateral petitions and the statutory and/or equitable tolling, if any, which may fill in the

25
26 1. Petitioner's superior court writ petition was filed on April 29, 1998, and denied on May
27 27, 1998. Pet. Exh. D. His court of appeal petition for writ of habeas corpus was filed on August
28 21, 1998, and denied on February 17, 1999. Pet. Exh. E. His petition in the California Supreme
Court was filed on April 29, 1999, and denied on July 28, 1999. Pet. Exh. F. The present petition
for writ of habeas corpus was filed on October 26, 1999.

gaps between and around them, have become relevant.

CONCLUSION

Accordingly, respondent and petitioner concur that the evidentiary hearing dates may be vacated, petitioner given 60 days from the status conference date of September 26, 2007, to oppose respondent's renewed motion to dismiss, to which respondent may reply within 30 days, and the matter submitted to the Court for determination of whether the matter may be determined on this basis or whether further development of the record by evidentiary hearing is required.

Dated: September 25, 2007

Respectfully submitted,

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IT IS SO ORDERED AS MODIFIED:

Having reviewed the parties joint status report and stipulation, the Court VACATES the Pretrial Conference set for September 26, 2007.

The Court also finds that the need for an Evidentiary Hearing unnecessary pursuant to the parties joint status report. The Court also VACATES the Evidentiary Hearing set for October 10 - 11, 2007. The parties shall file anticipated Motions and briefing on the remaining issues according to the **parties stipulation**. The Court submits these anticipated motions and briefing on the papers. If needed the Court shall set a further hearing subject to its availability.

Date: September 25, 2007


United States District Judge